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No. 945

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

LAWRENCE P. HICKEY, ET AL., *Petitioners,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' RESPONSE TO OPPOSITION

I

This is a suit to enforce a judgment rendered against Respondent by this Court in the *Lake Front Cases,* 146 U.S. 387, 184 U.S. 77, vesting title in the State of Illinois to a crucial portion of the lands in question.

Respondent concedes that the decree is *res judicata* but attempts to elude the *res judicata* effect by arguing in its Opposition, Point I, pp. 7-9, as if this Court's judgment was non-existent. Cases cited by Respondent, Point I of its argument, have no relevancy to the instant case because they did not involve a *res judicata* federal judgment or its enforcement. By the extraction of quotations out of context from these irrelevant authorities, Respondent has attempted to justify the judgment of the Illinois Supreme Court upon state grounds.

The alleged state grounds, *i.e.,* laches and estoppel, are untenable because Respondent was a party to the decree sought to be enforced in this case. Respondent does not even attempt to answer this fundamental legal conclusion. (Petition pp. 20, 21)

The fact is that this Court held in the *Lake Front Cases* that the title to these immensely important lands is held by the State of Illinois in trust for the people under a special type of trust which places these lands in a different category from all other lands owned by the State. The lands under the trust cannot be lost by the people except for a public purpose even by an Act of the Illinois Legislature, as held by this Court in the *Lake Front Cases.* The fact also is that the net effect of the decision of the Court below is to make a gift of these lands and air rights to the Respondent,

a private company, and thus deprive the people of property worth hundreds of millions of dollars.

The Railroad has never received a specific grant from the State of Illinois of this property; nor has it obtained in any way, other than the decision of the Court below, the title thereto.[1] It is absolutely clear, therefore, that the judgment of the Court below constitutes a nullification and utter disregard of the federal decree twice affirmed by this Court in the *Lake Front Cases.*

Respondent claims, without even citing one relevant authority in support of its position, that this Court is precluded from exercising its constitutional judicial powers under Article III, Sections 1 and 2 and Article VI (Supremacy Clause) of the United States Constitution because of state law grounds. This contention is so at variance with the facts and realities of this case that it is without merit. We respectfully submit that the enforcement of the *Lake Front Judgment* presents a federal question.

II

A portion of the lands in question was not expressly encompassed by the decree in the *Lake Front Cases.* Nevertheless said decree is *res judicata* upon these lands also because the decree expressly permanently enjoined Respondent from filling in any more of Lake Michigan. This Court's Opinion in the *Lake Front Cases* plainly held that the State of Illinois owned all of the submerged lands off its shores in trust for the people. But even if the *Lake Front Cases* were not *res judicata* with reference to this particular

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[1] *Droste* v. *Kerner* et al., No. 671, This Term, appeal dismissed, relied upon by Respondent (Opposition p. 2) is irrelevant here as no *res judicata* federal decree was involved in *Droste,* and the Respondent in *Droste,* unlike the Respondent herein, had a specific grant by an Act of the Illinois Legislature selling submerged lands for a valuable consideration. Moreover, the purpose of the legislative grant was to enable that Respondent to build a steel manufacturing plant which was in the public interest.

portion of the lands in question, the state's title to these lands, acknowledged in the *Lake Front Cases,* cannot be destroyed by the judgment of the Court below holding that the state is prohibited by laches and estoppel from asserting its title thereto.

By so holding the Court below acted in repugnance to the federal trust impressed by this Court in the *Lake Front Cases* upon the state's title to submerged lands. The trust is a federal right which prevents any state court from avoiding a review of its judgment by this Court. Where a federal right is involved it is within the province of this Court "to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair suport." *Ancient Egyptian Arabic Order N. M.S.* v. *Michaux,* 279 U.S. 732, 745.

State law determines the ownership of submerged land, provided the trust is not violated. However, it is within the province of the United States to make certain that the states do nothing with their titles to submerged lands in conflict with the trust.[2] This conclusion arises both from the *Lake Front Cases* and the *Submerged Lands Act* (43 U.S.C sections 1301 *et seq.*).

Respondent contends that because the trust of submerged lands in the Great Lakes was known to common law it can not be a federal trust. As this Court recognized in the *Lake Front Cases,* 146 U.S. at 436, the Crown alone could exercise such dominion over navigable waters as would insure freedom in their use so far as consistent with the public interest. In this country the United States replaces the Crown with respect to the control of navigable waters. The

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[2] This Court on January 10, 1967 affirmed the continuing interest of the United States in lands held by a state in trust for the people. *Lassen* v. *Arizona Highway Dept.,* 35 Law Week 4130.

trust doctrine being founded upon the necessity of preserving the use of navigable waters to all the people from private encroachment (Ibid), it is evident that the trust is a federal trust. The states own this submerged land subject to their use and disposition in accordance with said trust.

An analysis of the first *Lake Front Opinion* demonstrates the correctness of this conclusion. In that case, this Court held in essence that even the Illinois Legislature could not surrender its "sovereignty and dominion . . . or its ownership" of the "submerged lands in Lake Michigan" by giving the submerged lands of the state to Respondent as a gift adverse to the public interest (which in the instant case would be the result unless this Court reverses the judgment below). 146 U.S. at 459-60. This Court could have so held only if the trust which prohibited the Illinois Legislature from granting title adverse to the public interest was paramount to that of the state law of Illinois.

This same federal trust is implicit in the *Submerged Lands Act*, enacted by Congress in 1953. (43 U.S.C. sec. 1301 *et seq.*). Although said Act vests title to the submerged lands under the Great Lakes in the states bordering the Lakes, significantly it provides that nothing in the Act shall ". . . be construed as a release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation . . . ." 43 U.S.C. sec. 1311(d). Thus the Act itself perpetuates the sovereign powers of the United States in regulating navigable waters for the best interest of the people, the foundation of the trust doctrine.

Congress was fully aware of the *Lake Front Cases* enforcing this trust when it adopted the *Submerged Lands Act* (1953 U.S. Code, Congressional and Administrative News, Vol. 2, pp. 1428, 1518, 1530). Under well settled law, the trust doctrine was thus incorporated into this federal law, and state law cannot interfere therewith. *T.I.M.E.* v.

United States, 359 U.S. 464, 473-474; *United States* v. *Minker,* 350 U.S. 179, 188.

This conclusion is further strengthened by paragraph (a) of 43 U.S.C. sec. 1311 wherein subparagraph (1) pertaining to the States' ownership of submerged lands is not made subject to state law as is subparagraph (2) which refers to non-ownership.

The cases relied upon by the Respondent to the effect that state law governs the disposition of state owned lands are not in point. Those cases involve state owned lands not subject to the federal trust impressd upon submerged lands. This Court recognized the distinction between ordinary state owned lands and submerged lands owned by the state under this trust. 146 U.S. at 452.

Accordingly, even with respect to that portion of the lands in question not covered by the *res judicata* effects of the *Lake Front decree,* the Petitioners are seeking the vindication of federal rights which pose a federal question.

Conclusion

It is incredible that the Court below should have awarded the railroad the title to the immensely valuable lands and air rights involved herein, solely on the ground that state officials whose duty it was to protect the state's title failed to do so. Such action is indeed a reward to private interests for the dereliction of public duty. It is equally incredible that the Respondent should attempt to defend its untenable position on the ground that the Attorney General of the State of Illinois believes that no federal question exists. (Opposition 2, 3) His intervening complaint failed to raise the federal constitutional questions contained in Petitioners' complaint. (Petition p. 11) Only this Court can decide whether a federal question exists, and the opinion of the State Attorney General is irrelevant.

Petitioners instituted this suit more than six years ago and have borne the brunt of the litigation. The Illinois Supreme Court on two appeals in the case has recognized Petitioners' vested right to bring this litigation to enforce the title of the state held in trust for the people. The Petitioners indeed have done everything conceivable in the legal prosecution of the public interest.

Only this Court has the power to protect the people. This is the peoples last chance.

For the reasons mentioned, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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